RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002229-MR

B450 PROPERTIES, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
CIVIL ACTION NO. 04-CI-000122

EAP CONCEPTS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

MINTON, JUDGE: B450 Properties, Inc. appeals from a summary judgment granted to EAP Concepts, Inc. We affirm the summary judgment because the trial court correctly held that EAP could not be held to the terms of a lease to which it was not a party.

Although the parties urge different legal conclusions from them, the essential facts of this case are uncontested. In 1999, B450 leased its property in Louisville to Boom, Inc., who is not a party to this appeal. That lease was for a five-year

term, and Boom intended to operate a Tony Boombozz Pizzeria on the property. A little over a year into the term, B450 leased adjacent property to Boom, under a separate lease, which differed from the first only in that its term was three and one-half years, instead of five years.

Boom's business failed, and it filed for bankruptcy in late 2001. Boom operated its restaurant under a licensing agreement with EAP Concepts, Inc. The license agreement required Boom to pay a monthly fee to EAP in return for using EAP's brand trademark and EAP's training to operate as a Tony Boombozz Pizzeria. Under the licensing agreement, Boom's declaration of bankruptcy automatically placed it in default, giving EAP the right to "enter into the Restaurant and exercise complete authority with respect to the operating thereof until such time as Licensor [EAP] shall determine that the default of Licensee [Boom] has been cured and that Licensee is complying with the requirements of this Agreement." Likewise, the leases entered into between Boom and B450 gave B450 the option to take possession of the leased premises and terminate the lease if Boom became bankrupt. But B450 took no action to assert its right to retake possession of the leased premises when Boom declared bankruptcy because, according to B450, it was unaware that Boom had filed bankruptcy.

EAP, however, exercised its contractual right to take over the location. After the takeover, EAP operated the Tony Boombozz in Boom's location for approximately eight months, during which time EAP paid B450 the required rent and paid all taxes associated with the leased premises. EAP itself never made any written or verbal agreement with B450 regarding the premises. Then in June 2002, well before the expiration of the leases between Boom and B450, EAP vacated the leased premises to open another Tony Boombozz Pizzeria nearby.

Asserting that EAP had assumed Boom's lease, B450 filed this action in the circuit court against EAP for breach of the terms of its leases with Boom. The circuit court granted summary judgment to EAP after which B450 filed this appeal.

Before we examine the propriety of the summary judgment on its merits, however, we must identify the scope of our review. We are mindful of the fact that summary judgment was appropriate only if EAP showed that B450 "could not prevail under any circumstances."[1] In ruling on a motion for summary judgment, we must view the evidence in the light most favorable to the B450.[2] When we review a trial court's decision to grant summary judgment, we must determine whether the trial court

[1] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)).

[2] *Id.*

correctly found that there were no genuine issues of material fact.[3] As findings of fact are not at issue, the trial court's decision is entitled to no deference.[4]

B450 argues that Boom assigned its rights under the lease to EAP when EAP began running Boom's pizzeria. But this argument fails for two reasons. First, the lack of any written agreement between B450 and EAP runs afoul of the statute of frauds. Second, EAP may not be bound by the lease contract between Boom and B450 to which it was not a party.

It is undisputed that there was no written assignment of the leasehold interest from Boom to EAP. Generally speaking, "[i]f the lease itself is required to be in writing, an assignment thereof is also required to be in writing, at least if the unexpired term is of such length that a lease, or contract for a lease, for the period, is required to be in writing."[5] In the case at hand, the original lease terms were for five years and three and one-half years, respectively, and well over two years remained on the leases at the time Boom declared bankruptcy. Under Kentucky law, any lease for a period of time exceeding one year is required to be in writing by

---

[3] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

[4] *Id.*

[5] 72 Am.Jur.2d *Statute of Frauds* § 88 (2001) (internal footnote omitted).

virtue of the express terms of the statute of frauds.[6] Thus, the lack of a written contract between B450 and EAP dooms B450's argument that Boom assigned its rights and obligations under the leases to EAP.

In addition, the lease agreements were between Boom and B450, meaning that EAP was a stranger to them. Clearly, under our settled jurisprudence, the obligations contained in a contract may not be imposed upon a stranger to it.[7] Although Emmanuel Anthony Palombino was the sole owner of EAP and the majority owner of Boom, there is nothing in the record showing that Boom and EAP are not legally distinct, separate entities (as best evidenced by the fact that Boom alone filed for bankruptcy while EAP remained a viable, ongoing business). Thus, even though Palombino was involved in both Boom and EAP, EAP is a stranger to the leases between Boom and B450 and cannot be bound to the terms of the leases.

Furthermore, the leases require Boom to acquire B450's written consent before assigning Boom's leasehold interest. It is uncontested that Boom never sought, nor did B450 approve, any assignment of the lease to EAP. Thus, it is clear that no valid

---

[6] *See* Kentucky Revised Statutes (KRS) 371.010(6).

[7] Johnson v. Coleman, 288 S.W.2d 348, 349 (Ky. 1956) ("It is a rule of general acceptation that the obligations of a contract are limited to the parties thereto and cannot be imposed upon a stranger to the contract.").

assignment from Boom to EAP occurred when Boom declared bankruptcy and EAP took over Boom's pizzeria.

B450 also appears to argue that EAP's takeover of Boom's pizzeria somehow constitutes a de facto assumption of Boom's leasehold interest. But B450 has not cited to any authority holding that Kentucky recognizes such a de facto lease assumption. In fact, the cases cited by B450 are all readily distinguishable in that they involve either written assignments or subleases of leasehold interests, or the sale of property that had already been subjected to an ongoing, active leasehold interest.[8]

Next, B450 contends that EAP should not be able to rely upon the statute of frauds due to EAP's allegedly unclean hands. Often expressed as the maxim, "[h]e who comes into equity must come with clean hands,"[9] the doctrine of unclean hands serves to foreclose relief to a party who has engaged in "fraudulent, illegal[,] or *unconscionable*" conduct but "does not operate so as to repel all sinners from courts of equity."[10]

---

[8] *See, e.g.,* Consolidated Coach Corp. v. Consolidated Realty Co., 251 Ky. 614, 65 S.W.2d 724 (1933); Schmidt v. Louisville & N. R. Co., 139 Ky. 81, 129 S.W. 332 (1910); Francis Co. v. Lincoln Federal Bldg. & Loan Ass'n, 445 S.W.2d 153 (Ky. 1969).

[9] *See, e.g.,* Maas v. Maas' Adm'r, 255 S.W.2d 497, 498 (Ky. 1952).

[10] Dunscombe v. Amfot Oil Co., 201 Ky. 290, 256 S.W. 427, 429 (1923).

In the case before us, B450 points to no conduct by EAP that could be called fraudulent, illegal, or unconscionable. Perhaps EAP should have formally notified B450 of its takeover of Boom's restaurant. A failure to send such a formal notice cannot rise to the level of egregiousness necessary to constitute unconscionable conduct. Furthermore, any prejudice that may have theoretically befallen B450 from EAP's actions is muted by the fact that EAP was, by all accounts, a paying tenant. In addition, the record supports a finding that B450 had at least constructive notice of EAP's takeover of Boom's pizzeria by virtue of the fact that after the takeover, EAP paid rent to B450 with checks drawn from EAP's account. Moreover, B450 should have had notice of Boom's bankruptcy by being listed as a creditor in Boom's petition. In short, B450 has not pointed to anything tangible to prevent EAP from relying upon the statute of frauds.

Finally, B450 contends that public policy requires EAP to be bound by the terms of the leases between Boom and it. But B450 does not contest EAP's contention that this argument was not raised before the trial court. And we may not review

issues not raised before the trial court.[11] So we decline to rule on B450's public policy argument.

For the foregoing reasons, there was no genuine issue of material fact and EAP was entitled to summary judgment. Thus, the decision of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason C. Vaughn
Louisville, Kentucky

BRIEF FOR APPELLEE:

John H. Ruby
Louisville, Kentucky

[11] Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court.").